UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD,
Respondent,

Cases 36-CA-8743-1
36-CA-8789-1
and 36-CA-8842-1
36-CA-8849-1

EUGENE NEWSPAPER GUILD
CWA LOCAL 37194,
Charging Party.

BRIEF *AMICUS CURIAE* OF EMPLOYERS GROUP IN SUPPORT OF THE RESPONDENT EMPLOYER

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I. STATEMENT OF INTEREST

The Employers Group, headquartered in California, is one of the nation's oldest and largest human resources management organizations. It comprises nearly 5,000 companies of varying sizes in nearly every industry, employing approximately 2.5 million employees.

Because of its collective experience in employment relations matters, including its appearance as *amicus curiae* in more than 20 cases in state and federal court in the past decade (as well as in proceedings before various federal and state administrative bodies), the Employers Group is uniquely positioned to assess the impact and implications for employers of the legal issues presented in cases such as this one.

All or nearly all of the Employers Group member organizations are subject to the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151 *et seq.* and have a significant interest in how the Act is implemented. All the Employers Group members own or license e-mail systems maintained by the employer, or an agent of the employer, for the benefit of the employer. Many, if not all, members have policies governing employee use of employer internet and e-mail systems, including policies which prohibit personal or non-work use of company computers, internet, and e-mail systems.

II. STATEMENT OF THE CASE

Just as an employer retains control over who enters its physical property, it must be permitted to retain control over its electronic or "cyber-property." This control is essential to ensuring more than productivity, but also system integrity and employee safety and privacy. Employers must be allowed to establish and maintain non-discriminatory rules concerning the

use of their e-mail systems in the workplace, and where necessary insist on these rules to the point of impasse at the bargaining table.

This brief is submitted in response to the Board's invitation to interested *amici* issued on January 10, 2007. This *amicus* submits this brief today under the invitation issued by the Board. The relevant facts of the *Guard Publishing* case are summarized by the parties and will not be summarized here. We note, generally, however, that the Administrative Law Judge ("ALJ") properly observed that the Board has not yet held that an employer-owned electronic communications system constitutes a work area where solicitation by employees must be permitted.[1] The ALJ also properly held that an employer may limit employee use of its e-mail and electronic communications systems without unlawfully infringing on an employee's right to engage in protected activity.[2] The ALJ further held that the employer policy in question was not facially overbroad.[3] The Employers Group urges affirmance of these recommendations.

III. SUMMARY OF ARGUMENT

Any analysis of access to employer-provided electronic communications systems should begin with an examination of the core principles of employer property rights. Electronic communications systems are both an employer's property, and a productivity tool and, as such, are not public forums. Use of e-mail or an intranet posting to engage in arguably protected activity is more analogous to use of an employer's photo copier or printer, and not one-on-one oral solicitation. For these reasons, employers should have a largely unrestricted right to prohibit employee use of and access to electronic communications systems, including e-mail, for non-business purposes.

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1 *Guard Publishing d/b/a Register Guard*, Cases 36-CA-8743-1, 36-CA-8849-1, 36-CA-8789-1, 36-CA-8842-1 (2001), at 7.

2 *Id.*

3 *Id.*

If non-business use is permitted on an employer's system, employers must still be permitted to establish and maintain non-discriminatory restrictions governing such use and access. Employees are in effect licensed to use these systems, and employers should be allowed to impose restrictions on these licenses. License restrictions are required to preserve the employer's investment, sensitive employee and customer information, trade secrets, and to comply with numerous state and federal laws, including the Digital Millennium Copyright Act, Computer Fraud and Abuse Act, and Homeland Security initiatives.

The approach suggested in this brief is supported by existing precedent. If the Board believes a new general rule is required to address the issues raised by this case, the rule should be accomplished through rulemaking. Rulemaking provides the Board with an adequate record applicable to all employers – not merely the parties to this case. The Board's decision in this case will impact both union and non-union employers. Rulemaking also serves the interests of justice by providing due process to all interested parties affected by the Board's decision on these issues.

IV. ARGUMENT

Many commentators, several Administrative Law Judges and the Board's General Counsel have effectively started their analysis concerning employee use of employer provided e-mail in the middle of the process, rather than at the beginning.[4] These persons begin their analysis with the question of whether e-mails constitute solicitation, or whether an employer is discriminatorily enforcing system usage policies. This analytic approach ignores the core principles of preservation of employer property rights and entrepreneurial control recognized in

[4] *See Pratt & Whitney*, 1998 NLRB GCM LEXIS 51 (1998)

Republic Aviation v. NLRB,[5] *NLRB v. The Babcock & Wilcox Co.*,[6] *Lechmere v. NLRB*,[7] and their progeny. The analysis must begin with an examination of these core issues.

An employer e-mail system, like a telephone system,[8] or a public address system,[9] is a part of the employer's property. The employer bears the initial cost of developing the system, which can be costly. Additionally, the employer alone bears all the risks of owning and operating the system, which can be astronomical. McAfee, a world-renowned computer virus protection company, estimated that in 2002, computer viruses cost companies in excess of $13 billion due to data loss, system crashes, diminished corporate credibility, increased IT costs, and lost productivity.[10]

Because the employer ultimately bears the cost of developing the system, and because the employer alone bears the risk of loss when the system goes down, it is clear that the proper lens through which to view the issue of e-mail is that of employer property rights. Viewed as employer property, employer restrictions placed on the use of e-mail – such as non-discriminatory, absolute prohibitions on the use of e-mail for the purposes of soliciting for any commercial ventures, religion or political cause or outside organization – are both valid and necessary to comply with the Act.[11] In this sense, an employer e-mail system is no different than a copier, a bulletin board, or a public address system, all of which are items of employer property

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5 324 U.S. 793 (1945)
6 351 U.S. 105 (1956)
7 502 U.S. 527 (1992)
8 *Champion Int'l Corp.*, 303 NLRB 102 (1991)
9 *The Heath. Co.*, 196 NLRB 134 (1972)
10 Sendmail Inc., *Protecting Your E-mail Network* (2002) Proprietary whitepaper *available at*: http://www.hp.com/wwsolutions/linux/solutions/sendmail/docs/wp_protect_env.pdf
11 *See* 29 U.S.C. § 158(a)(2): "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it..."

which the Board has held an employer has an absolute right to exclude employees from using for purposes of organizing.[12]

The rules are equally clear as to non-employee users. In *Lechmere*, relying on *Babcock & Wilcox,* the Court said, "So long as non-employee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place."[13] In *Babcock & Wilcox*, the Court had said that the Act did not "require that the employer permit the use of its facilities for organization when other means are readily available."[14] Because such alternate means of communication were available, the Court rejected granting an unwanted easement to the employer's property for union organizers.

E-mail and electronic communications systems are also employer property. They are employer developed, operated, and maintained in whole or in part, just as a physical plant or even a copy machine or telephone network is developed and maintained. *Amicus* expects that other parties will in essence seek an easement for employee and third party use of these systems. As in *Lechmere*, such an easement is not instituted in this case.

A. Employer-Owned Electronic Communications Systems are a Productivity Tool, and not Mandatory Forums for Solicitation.

Both organized labor and groups opposed to organized labor have begun to use web-sites, weblogs and e-mail to distribute organizing and related information.[15] In addition to traditional unions, disgruntled employees, employee groups and independent contractors have taken

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[12] *The Heath. Co.,* 196 NLRB 134 (1972); *Churchill's Supermarkets, Inc.,* 285 NLRB 138, 155 (1987), *review denied and enfd.*, 857 F.2d 1474 (6th Cir. 1988), *cert denied*, 490 U.S. 1046 (1989); *Champion Int'l Corp.* 303 NLRB 102 (1991); *see also Union Carbide Corp.,* 259 NLRB 974, 980 (1981), *enfd. in relevant part,* 714 F.2d 657, 663-664 (6th Cir. 1983).

[13] 502 U.S. 527, 537

[14] 351 U.S. 105, 114

[15] One prominent example of internet organizing and labor mobilization is http://www.rescueamericanjobs.org/. Clearly, the internet is a potent labor tool. An equally potent anti labor tool is: http://unionfacts.com/.

advantage of the new technology, using the internet and e-mail to access current, former, and future employees to communicate their messages about an employer's practices and procedures.[16] One disgruntled employee sent e-mails to thousands of former co-workers, disrupting productivity and slowing the employers system in the process.[17] These new forums, which can be as effective as they are inexpensive, put a new slant on observation attributed to Mark Twain, "Never argue with a person who buys ink by the barrel."

This case is not about whether the means by which employees and employers obtain information has changed. It has. This case is about whether the Register Guard and other employers must share their "electronic ink," even thought it was purchased by the employer to accomplish business objectives.

By arguing electronic communications systems are a modern day "work area," labor in essence argues that the employer's electronic "ink" must be shared. Because this is inconsistent with the Board's prior precedent concerning similar workplace productivity tools, it must be rejected.[18]

1. The Board has long-recognized productivity tools, such as phones, fax machines and copiers, are not work areas, and that solicitation using these tools can be prohibited

An employer's right to prohibit solicitation using instrumentalities of communication provided by the employer is well-documented and unequivocal. In *The Heath Co.*, the Board

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[16] Some examples of this include the website launched by IBM retirees to deal with issues arising from the conversion of IBM's pension plan to a cash balance pension plan (www.ibmunion.com), and independent contractors at Microsoft who launched a website to organize and share information among high-tech company workers (www.washtech.org).

[17] *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003)

[18] *See Honeywell Inc.*, 262 NLRB 1402 (1982), *enfd.*, 722 F.2d 405 (8th Cir. 1983); *Eaton Techs.*, 322 NLRB 848, 853 (1997). In both *Honeywell* and *Eaton*, the Board determined without question than an employer is permitted to have a non-discriminatory policy prohibiting solicitation on its bulletin boards. In *Eaton*, however, the Board found unfair labor practices where the policies were not properly enforced.

recognized an employer's basic right to restrict union access to deliver pro-union messages over an employer-owned and controlled public address system.[19] The Board was not persuaded that because the employer had made anti-union messages over the same system, similar access was required for employees. This decision has been affirmed in numerous other cases involving photo copy machines,[20] telephone systems,[21] bulletin boards,[22] and television and video equipment.[23] The rationale and holdings of these cases are equally applicable to electronic communication systems.

2. Holding that electronic communications systems constitute a work area deprives employers of entrepreneurial control over their business, and potentially subjects employers to unwanted and unnecessary liability

The Board has approached with apprehension the application of existing precedent to emerging technologies. However, while these issues are couched in a new language of megabytes and gigabits, they do not require a new framework. The remedy to today's digital dilemmas are answered by *Republic Aviation* and its progeny.[24] The *Republic Aviation* Court's balancing of employer discipline, production, and property rights against the Act's protection of employee Section 7 organizing rights undoubtedly provides key guidance for the Board in applying non-discriminatory rules.

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[19] *The Heath Co.*, 196 NLRB 134, 136 (1972)

[20] *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991).

[21] *Churchill's Supermarkets, Inc.*, 285 NLRB 138, 155 (1987), *review denied and enfd.*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied,* 490 U.S. 1046 (1989). The Board noted in *Churchill's Supermarkets, supra* note 9, that "[a]n employer may lawfully forbid employees from engaging in solicitations for any non-work related object so long as the prohibition is limited to working time, is nondiscriminatory in its application, and there is no independent evidence that the rule is being imposed for union-related consideration." As such, the Board determined that "an employer had every right to restrict the use of company telephones to business-related conversations and to forbid employees from using company telephones for personal reasons." *See also Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enfd. in relevant part,* 714 F.2d 657, 663-664 (6th Cir. 1983).

[22] *See also Honeywell, Inc.*, 262 NLRB 1402 (1982); *Eaton Techs. Inc.*, 322 NLRB 848, 853 (1997).

[23] *Mid Mountain Foods,* 332 NLRB 229 (2000) (employer not required to permit union to use television/VCR to show pro-union video).

[24] 51 NLRB 1186 (1943), *enfd.*, 142 F.2d 193 (2nd Cir. 1944), *affd.*, 324 U.S. 793 (1945)

In *Guard Publishing*, relying on *Republic* Aviation and its progeny, the ALJ properly rejected the General Counsel's assertion in this case that a broad policy prohibiting use of e-mail for personal purposes violated the Act.[25] The Administrative Law Judge found that the employer's e-mail system was owned by the employer and was not a work area. This holding was consistent with the well-settled Board law that other employer instruments of communication (i.e., public address systems, bulletin boards, phone systems) were employer property and not employee work areas.[26] As such, the employer could restrict employee use of its computer systems on a non-discriminatory basis.

One ALJ has suggested that an employer's network or electronic communication system may constitute a work area if employees working remotely are required to "log-in" to work.[27] This assessment reflects both a fundamental misunderstanding of the technology and a misapplication of the law. In *Prudential Ins. Co. of America,*[28] the employees at issue, were scattered across the country. The ALJ suggested that "the relevant work area in this case is ambiguous inasmuch as it is located wherever the employee happens to be at the time he logs on to his computer." The ALJ determined that Prudential's e-mail/intranet system and that system alone were the work area. Defining work area in this incredibly broad sense – i.e., wherever the employee logs into the employer's network – is not what the Court contemplated in *Republic Aviation,* and is not a definition that is technologically or practically feasible for employers. Such a broad definition could have far reaching and costly implications for employers who are required to grant employees, and potentially third parties, access to their systems.

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[25] *Guard Publishing d/b/a Register Guard*, Cases 36-CA-8743-1, 36-CA-8849-1, 36-CA-8789-1, 36-CA-8842-1 (2001), at 7.

[26] *See Champion Int'l Corp.*, 303 NLRB 102 (1991).

[27] *Richman Foods, Inc. d/b/a Food 4 Less,* 2001 GCM LEXIS 43 (2001) (recommending dismissal of charge because union failed to provide proof that any affected employees used e-mail to perform work duties).

[28] 2002 WL 31493320 (Nov. 1, 2002).

While the ALJ in *Guard Publishing* avoided classifying the e-mail system as a work area, a definitive holding that an employer's e-mail system is not a work area for solicitation purposes is supported by existing precedent.[29] The Board has long held that employer instrumentalities of communication are outside of the scope of unfettered employee access.[30] If employees may not freely access such tools, clearly they cannot be work areas. Further support for such a holding comes in the form of *Republic Aviation's* notation that "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working is for work. It is therefore within the province of the an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed valid in the absence of evidence that it was adopted for a discriminatory purpose."[31]

Balancing employer property rights, managerial rights, and disciplinary rights and employee Section 7 rights is no easy task. The Board should establish policies recognizing an employer's right to establish and maintain nondiscriminatory control over employee use of electronic communications systems, and blanket prohibitions on non-employee use, in accordance with past Board practice and procedure.[32]

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[29] While past cases have clearly held that an employer has a right to impose nondiscriminatory regulations upon employee use of employer resources and modes of communication, none of the earlier Board cases has clearly held that the modes of communication is not a work area. *See e.g., Churchill's Supermarkets, Inc.*, 285 NLRB 138, 155 (1987); *Champion Int'l Corp*, 303 NLRB 102 (1991).

[30] *The Heath. Co.* 196 NLRB 134 (1972); *Churchill's Supermarkets, Inc.*, 285 NLRB 138, 155 (1987), *review denied and enfd.*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied,* 490 U.S. 1046 (1989); *Champion Int'l Corp.*, 303 NLRB 102 (1991); *see also Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enfd. in relevant part,* 714 F.2d 657, 663-664 (6th Cir. 1983).

[31] 324 U.S. 793 at fn 10.

[32] *See supra* note 24.

3. Use of an employer-provided e-mail system to communicate with coworkers is distribution, not solicitation.

In *Pratt & Whitney,* 1998 NLRB GCM LEXIS 51 (1998), a 1999 General Counsel Memorandum, the then-General Counsel suggested that employees must be allowed to engage in discussions regarding terms and conditions of employment on company provided systems. This guidance, which is not binding on the Board, ignored key differences between oral solicitation and e-mail.

The General Counsel wrote that e-mails intended to elicit only a brief response are a substitute for oral solicitation. The General Counsel stated that in distinguishing between solicitation and distribution, the nature of an employee's interest and purpose in transmission of a message must be balanced against the interests of the employer. The General Counsel opined:

> Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution. If it is solicitation, it must be permitted in all areas in the absence of an over-riding employer interest; if it is distribution, it may be prohibited in work areas unless the employees have no available non-work areas.

Id. at 13-14.

The General Counsel further opined that if employees are using e-mail to communicate on terms and conditions of employment, the employer may not prohibit these messages provided "there is no evidence of special circumstances that make such a prohibition necessary in order to maintain production or discipline." *Id.* at 16.

The General Counsel provided no specific guidance on what types of electronic mail transmissions might be distribution rather than solicitation, nor can any such guidance be

provided as a practical matter. The General Counsel suggested only that e-mail intended to be a one-way communication, such as the mass distribution of a flyer or a position paper, is likely a substitute for distribution.[33]

The rule suggested in *Pratt & Whitney* is unrealistic and employers apply it at their peril. Enforcement of this rule requires that an employer second-guess the intent of an employee who transmits an e-mail regarding potential organizing – a dangerous proposition. Under this rule, employers cannot safely punish employees for diminished job performance for their improper or excessive use of e-mail and internet systems without risking liability under the Act. The *Pratt & Whitney* rule puts employers in an untenable position – requiring employers to provide employees with access to e-mail in order to compete in the global marketplace, but preventing employers from adequately protecting their interests and indeed, their electronic assets, from outside interference.

E-mail, is not, as suggested by the General Counsel, a substitute for oral solicitation. "E-mail" is a series of complex transactions carried out between computers. A Simple Mail Transfer Protocol (SMTP) creates a set of rules for the "conversation" that takes place between the sending and receiving computers.[34] SMTP is set up as an open standard, meaning it is a universal language that is known to all computers and programmers attempting to have an e-mail

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[33] In subsequent Advice Opinions, the General Counsel has proposed two additional seemingly unenforceable directives regarding the limits of lawful solicitation. In *Texas Utilities,* 2000 NLRB GCM LEXIS 31 (2000), the General Counsel suggested that a prohibition on non-business related "bulk" e-mail may be overbroad and unlawful. In *National TechTeam, Inc.,* 2000 NLRB GCM LEXIS 30 (2000), the General Counsel has suggested that an employer's discipline of an employee for downloading and saving several articles regarding the Teamsters Union and a Word document containing a rebuttal to the employer's anti-union videos constituted improper use of the company's system and supported lawful discipline. This decision inexplicably suggests that while distribution of such memos is protected activity, that storage or creation of such memos on company systems may be unprotected activity.

[34] *See generally* Derek Bambauer, *Solving the Inbox Paradox*, 10 Univ. Va. J. Law and Tech. 5, 12 (2005).

"conversation."[35] E-mail is routed through a series of hubs and servers that send the individual pieces of information to the correct recipients. Contrary to the General Counsel's idea that e-mail can be easily classified as a brief, two-sided conversation, the reality is that *every single e-mail sent* has the potential to reach thousands, if not millions of recipients. Because of its easily transferable, universal format, e-mail can be saved, forwarded, printed, and/or distributed in any number of forms. An e-mail can be sent to one individual, or to many; an e-mail can be sent with the intent to spark a single conversation or with the intent to distribute to provoke a debate among thousands with just the click of a button.

Pratt & Whitney also ignores another critical fact: when making an e-mail communication, the employee is using the employer's electronic "ink." For this reason, as with phones, copiers and bulletin boards, this is in essence a written communication that risks overloading e-mail servers, in boxes and spam filters. As such, the bright line to be drawn here is clear: e-mail and electronic postings are not solicitation, but are distribution, and may be prohibited in their entirety on electronic communications systems.

4. Employers who allow their systems to be used for organizing could be accused of providing unlawful assistance to a labor organization

It is well-settled that providing unions with financial or other assistance can be unlawful for this reason, providing e-mail access to unions for organizing purposes exposes employers to charges of unfair labor practices. In Section 8(a)(2) of the Act, Congress forbade employer domination of labor organizations – including forms of assistance such as providing monetary and in-kind forms of support designed to curry favor with employees to influence their selection

[35] *Id.*

of bargaining agents.[36] Access to e-mail is a valuable asset, and user fees for commercial e-mail access can prove very costly. By providing unions with access to employer e-mail or allowing employees to utilize the employer's e-mail system in efforts to decertify the union, employers are providing employees and/or unions with a valuable in-kind benefit. Employers therefore should not be forced to commit potential violations of the Act by providing its employees and unions with a valuable resource in organizing and decertification campaigns.

The Board has a long history of finding unfair labor practices where employers have provided in-kind assistance to unions. In *Ryder Systems*, 280 NLRB No. 118 (1986), *enfd.*, 842 F.2d 332 (6th Cir. 1988), the Board held that it was a violation of Section 8(a)(2) for the employer to permit union solicitation or union meetings on company time and company property, using company meeting space and resources to conduct such meetings. Similarly, in *Keeler Brass Automotive Group*, 317 NLRB No. 161 (1995), the Board held that the employer had unlawfully contributed support to a labor organization by supplying necessary materials in a conference room, including secretarial assistance, and by paying labor organization members who were conducting labor business. Given the Board's history of finding unfair labor practices for providing monetary and in-kind benefits to unions, employers should not be forced to provide unions with free access to employer resources.

Similarly, allowing unions free access to employer-owned systems puts employers in the precarious position of being vulnerable to accusations of criminal conduct pursuant to LMRA Section 302. By providing e-mail or internet access to unions, an employer may unwittingly be providing a union with an asset valued at up to $30/month for the duration of an organizing

[36] 29 U.S.C. § 158(a)(2)

campaign or for the term of a collective bargaining agreement.[37] This benefit can add up quickly, and can prove costly for an employer from both a monetary standpoint, and a legal standpoint as well, considering prospective Section 302 liability.[38]

In *Caterpillar Inc. v. UAW,* 107 F.3d 1052, 1056 (3d Cir. 1997), *cert. dismissed*, 523 U.S. 1015 (1998), the court suggested that the paid leaves of absence were permissible because they were a collectively bargained-for benefit and presumably if the employer was willing to offer this benefit, then the employer must have received something in return. *Amicus* disputes this analysis. Moreover, a rule forcing employers to provide costly access to an employer's system before any bargaining has taken place does not involve any trade-off. The Employer receives no bargained for benefit in such a situation. The stakes are high for employers faced with the prospect of granting access to third party unions under applicable labor law, and employers should be able to categorically exclude third parties from accessing their property.

B. Employers Must be Allowed to Establish and Maintain Non-Discriminatory Restrictions Concerning the Use of Electronic Communications Systems

An employer's exercise of its managerial prerogative to maintain production, discipline, or otherwise prevent the disruption of the business has long been recognized by the Board.[39] In accordance with this long-standing precedent, the Board should permit employers to establish objective, non-discriminatory rules governing employee access to electronic resources such as

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[37] A review of websites of ISPs providing e-mail and internet service to residential and commercial users revealed that Netzero provided access for $6.95/mo (www.netzero.com), Comcast provided access for $19.99/mo for up to six months (www.comcastoffers.net), and Verizon provided access for $29.99/month (www.verizonmarketing.com).

[38] 29 U.S.C. § 186(a)

[39] *See e.g. Firestone Tire & Rubber Co. Inc.*, 238 NLRB 1323 (1978); *International Business Machines*, 333 NRLB 215 (2001), *rev. denied, enf. granted by.*, 31 Fed. Appx. 747 (2nd Cir. 2002) (unpublished disposition).

internet and e-mail. This approach will protect vital employer resources, and produce a result consistent with long standing Board and Court precedent.[40]

1. Limited non-business use of an electronic communications system does not create a public forum

The Board has previously held that an employer that allows employees to use e-mail for personal purposes will have to permit some communications regarding union organizing and other non-business related matters.[41] In *E.I du Pont de Nemours Co.,* 311 NLRB 893, 919 (1993), the Board held that a policy which allows limited personal use of company supplied e-mail but prohibits use of e-mail for purposes of organizing is unlawful.[42] Little guidance, however, is provided in that case or any other case, though, as to the scope of conduct which must be permitted.

For example, other Board cases permit an employer to enforce its rules against solicitation, even though it has permitted a de minimis amount of charitable or other solicitation.[43] For many legitimate reasons, employers should not be held to have created a public forum by allowing employees to occasionally receive e-mails from immediate family members or a few known colleagues regarding birthday parties or birth announcements.[44]

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[40] *Wal-Mart Stores, Inc. (Gettysburg),* 2005 WL 4268624 NLRBGC (2005)

[41] *See Fleming Companies, Inc.,* 336 NLRB 192 (2001) (holding that if an employer allows employees to use its communications equipment for non-work related purposes, it may not validly prohibit employee use of communications equipment for Section 7 purposes).

[42] *But see Adtranz ABB Daimler-Benz Transportation N.A., Inc.,* 331 NLRB 291, 293-94 (2000), *vacated in part by,* 253 F.3d 19 (D.C. Cir. 2001) (holding that employer's e-mail policy which permitted e-mails of a personal nature could not exclude the union as a topic of discussion but noting that the employer never sought to bar discussion of the union. Unequivocally stating that the employer could bar all personal use by employees of computer and e-mail system.)

[43] *See e.g. Hammary Mfg. Corp.,* 265 NLRB 57 (1982); *Serv-Air, Inc.,* 175 NLRB 801 (1969), *on remand from,* 395 F.2d 557 (10th Cir. 1969)

[44] *See supra* note 41.

In *Washington Fruit and Produce Co.*, 343 NLRB No. 125 (2004), the Board upheld an employer prohibiting employee efforts to "persuade" fellow employees to support a cause, even though it had permitted employees to talk about "Sunday's game." The Board held that unlike small talk, solicitation could cause "unnecessary apprehension and pressures for fellow employees."

In *Wal-Mart Stores, Inc. (Gettysburg)*, 2005 WL 4268624 (NLRBGC) (2005) the General Counsel relied on Washington Fruit and Produce Co. in determining that Wal-Mart's policy against solicitation, which permitted a certain amount of personal discussion, for example, about the personal lives or other non-coercive topics, was not disparately enforced when a union organizer was disciplined for engaging in on-the-job solicitation.[45] The General Counsel's opinion was that Wal-Mart could lawfully proscribe solicitation on working time, "notwithstanding its toleration of other kinds of employee conversations."[46] Likewise, the Board should determine that even where an employer tolerates some limited personal communications, it can still enforce a lawful no-solicitation policy.

a. Employers have a vital interest in protecting system integrity and efficiency

In *Solving the Inbox Paradox* 10 Univ. Va. J. Law and Tech. 5, 12 (2005), Derek Bambauer[47] identifies the prospective costs to recipients of unwanted electronic mail:

1) Hardware costs (personal computer for recipients, SMTP/POP servers for ISPs [internet service providers], message storage such as hard drives or storage area networks, etc.) [POP servers are defined as post office protocols, and are a method of downloading e-mails from an internet service provider's server to a recipient's computer work station]

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45 *Wal-Mart Stores, Inc. (Gettysburg)*, 2005 WL 4268624 NLRBGC (2005), at *2

46 *Id.*

47 Fellow, Berkman Center for Internet & Society, Harvard Law School.

2) Internet access (T-3 lease for ISPs, ISP fees for users, etc.)

3) Message processing or filtering (use of blacklists by ISPs, use of filters by ISPs or end users, time to read and delete messages by end users, risk of missing desired messages due to volume of unwanted ones, etc.)

4) Risk (reputational costs for ISPs that deliver spam to their end users, potential harm to end users from fraudulent messages (such as "phishing ones") etc.)

5) Psychological effects on users, such as from viewing pornographic spam, or from the annoyance of having to manage large volumes of unwanted mail.

Several recent cases illustrate the risks to employers of unrestricted, open access to third parties. In *Intel Corp. v. Hamidi,* 30 Cal. 4th 1342 (2003), Intel Corp. filed an action against a former employee who flooded Intel's e-mail system with thousands of e-mails critical of Intel's employment practices. The lower court ruled in Intel's favor on a trespass to chattels theory, finding that damage to Intel's servers from having to handle the massive quantities of mail qualified as "actual damage" sufficient to sustain a tort action. The California Supreme agreed that trespass was a viable theory against Hamidi, but disagreed that sufficient evidence had been presented to prove this theory.[48] Other courts have also determined that massive quantities of unwanted e-mail qualifies as "actual harm" sufficient to sustain a cause of action for trespass to chattels. *School of Visual Arts v. Kuprewicz,* 3 Misc.3d 278, 281, 771 N.Y.S.2d 804, 807 (2003).[49] To avoid this risk, an employer should be able to formulate and enforce strong, facially valid no-solicitation policy.

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[48] *Intel Corp. v. Hamidi,* 30 Cal. 4th 1342, 1364

[49] In *Kuprewicz,* a disgruntled former employee posted false job openings on various employment websites, causing the employer to receive massive quantities of unwanted responses. The former employee also signed the employer up for pornographic spam, and the employer received hundreds of pornographic spam messages. The court held that this type of e-mail system abuse constituted "harm" enough to make out a cause of action for trespass to chattels.

While these two cases dealt with disgruntled former employees, the system costs illustrated here could easily become a commonplace occurrence for employers whose e-mail systems have become a free-for-all during a union organizing effort. Spam and bulk mailings present not only a serious threat to the employer's system, but also present a distraction to the employer's workforce.

The NLRB has routinely upheld an employer's managerial prerogative to maintain discipline and productivity in the workplace, particularly with regard to the maintenance of facially valid no-solicitation policies. In *Washington Adventist Hospital, Inc.*, an employer maintained a facially valid no-solicitation policy.[50] An employee nonetheless used the employer's computer system to send an electronic "break message" to all hospital computer terminals – essentially an electronic message criticizing the employer's employment practices that popped up on the screen that required user intervention and interrupted employee productivity and hospital operations. The ALJ determined that the employee's personal use of the hospitals systems violated hospital policy and that his Section 7 rights were not implicated by the discipline he subsequently received. The Board noted that any protection the employee's message might have had was lost as a result of the method by which he chose to communicate his message.[51]

In a recent labor arbitration, an arbitrator upheld the employer's right to review and/or monitor electronic communications where questions about productivity and compliance with applicable policies and law were raised.[52] In the *AlliedSignal* arbitration, where employee productivity was compromised by improper use of electronic resources – for example,

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[50] 291 NLRB 95 (1988)
[51] *Id.*, at fn 1.
[52] *In re AlliedSignal Engines,* 106 LA (BNA) 614 (1996)

downloading excessive amounts of horse-racing information, or creating and distributing an offensive employee newsletter – employer oversight of and control of its electronic resources was justified in accordance with its facially valid policy.[53] Though the employer's discharge of the employee was ultimately found to be in violation of the employer's progressive discipline policy, the importance of allowing employers to formulate policies to regulate employee e-mail access in order to maintain a high level of productivity cannot be understated.

b. Employers have a vital interest in monitoring systems to comply with statutory and common law obligations.

In a clear statement of an employer's potential liability for what an employee posts on the internet, the New Jersey Supreme Court in *Blakey v. Continental Airlines*, 751 N.J. 38, 57, 751 A.2d 538, 549 (2000), said that "Thus, standing alone, the fact that [an] electronic bulletin board may be located outside of the workplace ...does not mean that an employer may have no duty to correct off-site harassment by employees." Accordingly, employers have a vital interest in monitoring system use in order to prevent employee harassment and to comply with other common law and statutory duties.

In the *Blakey* case, plaintiff was an airline pilot who alleged her employer had not taken sufficient steps to remedy harassing and defamatory statements allegedly posted by coworkers on an online bulletin board. While the online bulletin board was used by employees to check schedules and exchange shifts, it was owned and maintained by a separate private entity, CompuServe. While the court ultimately held that employers did not have a specific duty to monitor all private communications of their employees, it held that "employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason

[53] NB: The work force in *AlliedSignal* was non-union, and the arbitration did not arise under a collective bargaining contract or other union agreement, rather an employer-promulgated arbitration and appeals process.

to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace."[54] The court noted that the likely result was that "[i]t may mean that employers may not disregard the posting of offensive messages on company or state agency e-mail systems when the employer is made aware of those messages."[55]

The *Blakey* case sends a clear message to employers – monitoring employees' electronic conduct is not merely a "best practice" but a necessary practice to avoid state and federal liability for harassment, defamation, and other serious violations of law. It is therefore necessary for the Board to permit employers to develop non-discriminatory regulations governing the monitoring of employee communications in order to permit employers to fully comply not only with the Act, but also with all applicable local, state and federal laws.[56]

Monitoring obligations may arise not merely where harassment laws are concerned but also where laws governing digital piracy, computer fraud, and Homeland Security are at issue. The Computer Fraud and Abuse Act ("CFAA") prohibits knowingly accessing a protected computer and obtaining something of value without authorization.[57] For example, in *Charles Schwab & Co v. Brian D. Carter, Acorn Advisory Management LLC,* No. 04 C 7071, 2005 WL 2369815 (N.D. Ill, Sept. 27, 2005) the district court held that a principal can be liable for its agent accessing valuable protected employee information on another entity's computer system. In the *Schwab* case, defendant Carter was a former Schwab employee and accessed Schwab's

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[54] *Blakey v. Continental Airlines*, 751 N.J. 38, at 62.
[55] *Id.*
[56] *See e.g., Charles Schwab & Co v. Brian D. Carter, Acorn Advisory Management LLC,* No. 04 C 7071, 2005 WL 2369815 (N.D. Ill. Sept. 27, 2005).
[57] 18 U.S.C. § 1030(4)

computers to obtain confidential information. Therefore, under the CFAA, an employer may have a responsibility to monitor employee's computer, e-mail, and internet usage.

Additionally, under the Digital Millennium Copyright Act of 1998,[58] ("DMCA"), an employer may have an obligation to ensure that its employees are not engaged in the circumvention of the technological measures used in protecting copyrighted works. Employers therefore may have an obligation to ensure that employees are not downloading movies, music, etc., and copying them onto company hard-disk space; producing CDs or DVDs using company property, and especially to ensure that employees are not e-mailing copyrighted works using company e-mail systems.[59] In light of the serious consequences that a violation of the DMCA can carry for an employer, an employer has a compelling interest in monitoring employee conduct to ensure compliance with the law.

2. Concrete, Objective Guidance is Supported By Existing Precedent.

For the reasons set forth above, if solicitation by employees is allowed on an employer's electronic property, such activity must be subject to certain objective restrictions. These restrictions, common in employer policies, can be approved pursuant to existing precedent. Examples of such restrictions include, but are not limited to:

- Restriction of non-business use to non-working time;
- Blocking and filtering of e-mail from unauthorized addresses;
- Prohibition of mass or chain e-mails;
- Prohibitions on solicitation for any outside organization or religious or political cause;

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[58] Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)
[59] *See* id.

- Restrictions and/or prohibitions on e-mails and/or attachments of certain file sizes;
- Re: lines must be used to distinguish between personal and business e-mails;
- Non-business e-mail must be sent by the lowest delivery priority; and
- Prohibition or blocking of third parties from directly or indirectly accessing an employer-owned system.

C. Any new general rules concerning emerging workplace technologies should be established through rulemaking, not adjudication.

The Board posed seven questions in its invitation for amicus briefs. Several of these questions seek information well beyond the scope of the record in this case, and suggest the Board is considering broad new rules concerning workplace access to, and use of workplace technology, these include: "May an employer . . . prohibit e-mail access to its employees by non-employees?" (question 3); "If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?" (question 3); "[W]hat relevance is the location of the employee's workplace?" (question 4); "[S]hould the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?" (question 4); "Are there any technological issues concerning e-mail or other computer based communication systems that the Board should consider in answering the foregoing questions?" (question 7).

This case does not involve direct contact by a third party using an employer's e-mail address, allegations of unlawful monitoring or surveillance, or remote workplaces. Little technical information appears in the briefing concerning technological issues including filters, blocking software, firewalls or virus software. To the extent the Board considers these issues in

this case, and determines new rules of general application are required, these rules should be the product of rulemaking, not adjudication.

1. Notice and comment rulemaking is expressly authorized by the Act, and the Board's exercise of this authority has been endorsed by the United States Supreme Court.

Section 6 of the Act states: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this subchapter." 29 U.S.C. § 156. When the Board last exercised this authority, it was endorsed by a unanimous Supreme Court. *American Hospital Assn v. NLRB*, 499 U.S. 606, 620 (1991).

Despite the express authorization to engage in rulemaking, the Board has elected to promulgate rules through adjudication provided in the Act, and the approval of the Supreme Court for this approach, rather than notice and comment rulemaking. The Board's reluctance to engage in notice and comment rulemaking has been criticized by the United States Supreme Court, Courts of Appeal and academics.[60] Despite this criticism, rulemaking through adjudication has withstood the test of time and Court challenges. *NLRB v. Bell Aerospace Co.*, 410 U.S. 267, 294 (1974) (rejecting arguments that Board was required to elect rulemaking over adjudication in case where Board determined generalized standard would be of marginal utility). In this case, though, rulemaking and not adjudication is the best alternative for all interested parties.

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[60] *See American Hospital Assn. v. NLRB*, 899 F.2d 651 (7th Cir. 1990), *affd.*, 499 U.S. 606, 659-660 (1991). Judge Posner, while upholding the Board's decision to engage in rulemaking in the *American Hospital* case, noted that "For its first forty-four years, the Board tried to channel its discretion over unit determination in common law fashion and modifying standards case by case. That was the approach it took when the nonprofit healthcare sector was brought under its aegis in 1974. The approach is widely regarded as a failure, not least by the courts of appeals, including this court; certainly the Board was entitled to regard it as such." Posner went on to hold that , "...there was no statutory obstacle to the Board's bringing the unit-determination process in the hospital industry under the aegis of a rule."

2. Use of notice and comment rulemaking in this case would provide all interested parties adequate opportunity to present expert testimony and factual evidence for consideration by the Board.

This case has been pending since 2002. This is despite the fact that for over seven years, all cases that involve the use of electronic mail or the internet for protected activity have been referred to the Board's Division of Advice. NLRB General Counsel Memorandum GC 99-10 (December 22, 1999). While the Board has issued orders concerning discrete issues in this area, cases that have presented more complex issues, such as this case, have been left undecided. During this same period of time, critics have continued to assert that the inability of the Board to resolve issues quickly has caused labor organizations to seek alternatives other than secret ballot elections for resolving representational issues. If the Board is considering new general rules in this case concerning use of and access to employer-provided technologies in the workplace, and is seeking to establish such rules in this case, such guidance is best provided through rulemaking.

The Register Guard workplace appears to be a largely traditional workplace where employees report to a single site of employment for delivering stories to editors, and accessing computers and telephones needed to perform their job duties. While these employees may work remotely from time to time, this is not a case where employees rarely report to a single reporting location or work from a home office. While other *amici* may argue that as workplaces continue to change, and telecommuting and remote reporting locations become more common, that new rules concerning what constitutes protected activity and what constitutes the proper accommodation between employer property and employee protected activity also require change. These issues are not presented – or adequately argued or briefed – in this case.

In 1987, the Board used its authority to engage in notice and comment rulemaking to establish rules concerning bargaining units in acute healthcare facilities. One commentator,

citing interviews with Board members, has suggested that this approach was taken because it best protected the interests of all parties by allowing them to present evidence, and that this adversarial process was consistent with the labor-relations model the Board and its constituencies accepted. Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 Duke Law Journal 274 (1991). During the public comment period, the Board received testimony from 144 witnesses, and accepted over 5,000 pages of evidence and written comments into the record. While more than the APA required, the Board's decision to engage in this detailed and exhaustive analysis was affirmed by the United States Supreme Court in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991) in a unanimous decision. If, in this case, the Board seeks to consider all of the questions posed, and examine in detail how e-mail, internet, and intranet systems work, the parties should be provided an opportunity to introduce evidence and testimony on these issues.

Ultimately, resolving the issues presented in this case may require expert testimony which includes technical guidance from information technology professionals. Such experts could attest to the costs to employer productivity from unwanted spam, viruses and e-mailing of large attachments or files. These expert witnesses could also testify concerning firewalls and other available protections put in place to avoid data corruption and disclosure of confidential or private information. These expert witnesses could also testify to the effectiveness of blocking and filtering software to prevent denial of service attacks, viruses and related schemes. If such evidence is to be considered, all interested parties should be provided an opportunity to participate in the presentation and challenging of such evidence. If wholesale change is envisioned or considered, only the deliberative process of notice and comment rulemaking, and

not amicus briefs submitted on relatively short notice, will adequately protect the interests of all affected.

3. The use of notice and comment rulemaking will provide all interested employers and employees with adequate due process in this matter.

In addition to providing all interested parties the opportunity to provide required record evidence, rulemaking also provides all affected parties a more efficient and reliable means of judicial review. The issues raised by the Board's questions clearly extend beyond this case, and beyond these parties. While the Employers Group appreciates the opportunity to participate in this process, to the extent a final order is issued in this case, only the parties to the proceeding may challenge that order. Also, when a reviewing court reviews any order issued in this case, that court may limit its review to the factual circumstances of this case. Other affected employers with the same or related issues would then be able to obtain judicial review on this important issue only when faced with an adverse decision.

Notice and comment rulemaking provides an orderly and expeditious remedy for all interested parties to participate in the development of standards on the issues raised in this case. Proceeding by adjudication and order exposes both the Board and the courts to challenges to multiple orders, which could result in continued delays and inconsistent rulings. For these reasons, Employers Group suggests that if the Board desires new rules in this area, rulemaking, and not adjudication, is the better approach.

V. CONCLUSION

Long-standing precedent permits employers to control access to their property. E-mail systems should not be treated differently than employer property has been treated in the past. Employers must be able to restrict the persons and purposes for which their systems will be used.

If the Board seeks to develop a new framework in this area, notice and comment rulemaking is the best means of preserving the rights and interests of all affected parties.

Respectfully submitted,

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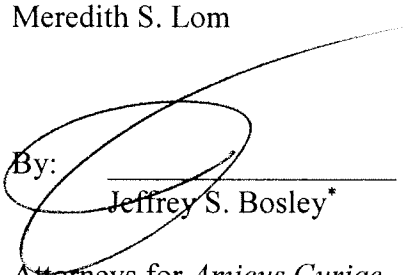

By: _____
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD,
Respondent,

Cases 36-CA-8743-1
36-CA-8789-1
and 36-CA-8842-1
36-CA-8849-1

EUGENE NEWSPAPER GUILD
CWA LOCAL 37194,
Charging Party.

REQUEST FOR ORAL ARGUMENT

Pursuant to the Board's January 10, 2007 invitation, Employers Group requests to be heard at oral argument in this matter. Employers Group and its member organizations have a substantial and compelling interest in these proceedings. With this request, Employers Group has filed an *amicus* brief setting forth in great detail its argument and interest in this matter.

PROOF OF SERVICE

I, Lawrence Legall, hereby declare:

I am a resident of the State of New York, over the age of 18 years and not a party to the within action. My business address is Winston & Strawn, LLP, 200 Park Avenue, New York, NY 10166. On the date stated below, I served a true copy of:

BRIEF *AMICUS CURIAE* OF EMPLOYERS GROUP IN SUPPORT OF THE RESPONDENT EMPLOYERS,

REQUEST FOR ORAL ARGUMENT

_____ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail, at New York, addressed as set forth below.

_____ by causing to be personally delivered the document(s) listed above to the persons at the address(es) set forth below.

__X__ by overnight delivery by enclosing a true and correct copy of said document(s) in a (Federal Express) envelope(s) addressed as set forth below. The envelope(s) was (were) sealed and deposited with Federal Express that same business day in the ordinary course of business at New York, New York.

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